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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GRAVES TRUCK LINE, INC.,

Petitioner,

vs.

APPLETON ELECTRIC COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

Whether the Court below erred in holding that a statute of limitations was tolled as to a class of unnamed defendants, from the filing of the class action to the time a particular defendant is notified of the suit and chooses to opt out.

Whether default judgments for specific amounts of damages entered against a defendant in default for failure to appear, upon an open-ended complaint requesting "judgment against all of the defendants herein in an amount to be determined by this Court, together with interest, attorneys' fees and cost of suit" are void or voidable for entry in violation of defendant's right to due process of law, or in violation of Federal Rules of Civil Procedure 5(a), 8(a)(3) and 54(c).

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner, Graves Truck Line, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 25, 1980.

OPINION BELOW

The opinion of the Court of Appeals is reported at ____ F. 2d ____ (1980). A copy of the opinion appears as Appendix A. The opinion of the District Court for the Northern District of Illinois, Eastern Division, entered on April 30, 1979, appears as Appendix B. A copy of the prior opinion of the United States Court of Appeals for the Seventh Circuit, entered April 4, 1978, appears as Appendix C. A copy of the District Court order establishing the default procedure which is the subject of all the other opinions appears as Appendix D.

JURISDICTION

The judgment for the Court of Appeals for the Seventh Circuit was entered on November 25, 1980. This petition for certiorari was filed within 60 days of that date pursuant to Rule 20 of the Rules of this Court. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254(1).

Constitutional Provisions, Statutes and Rules Involved

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U.S.C. § 16(3)(4)

(3) *Limitations of action.* (f) A complaint for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

Federal Rule of Civil Procedure 4(a)

Process. (a) *Summons: Issuance.* Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

Federal Rule of Civil Procedure 5(a)

Service and Filing of Pleadings and Other Papers. (a) *Service: When Required.* Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

****

Federal Rule of Civil Procedure 8(a)(3)

General Rules of Pleading. (a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

Federal Rule of Civil Procedure 15(c)

(c) *Relation Back of Amendments.* Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Federal Rule of Civil Procedure 23

Class Actions. (a) *Prerequisite to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

(b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include:

(A) the interest of members of the class in individually controlling the prosecution or defense of separate actions:

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;

(D) the difficulties likely to be encountered in the management of a class action.

(c) *Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.*

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that

(A) the court will exclude him from the class if he so requests by a specified date;

(B) the judgment, whether favorable or not, will include all members who do not request exclusion; and

(C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate

(A) An action may be brought or maintained as a class action with respect to particular issues, or

(B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) *Orders in Conduct of Actions.* In the conduct of actions to which this rule applies, the court may make appropriate orders:

(1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument;

(2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the

judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action;

(3) imposing conditions on the representative parties or on intervenors;

(4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly;

(5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) *Dismissal or Compromise.* A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Federal Rule of Civil Procedure 54(c)

(c) *Demand for Judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Federal Rule of Civil Procedure 82

Jurisdiction and Venue Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein. . . .

Federal Rule of Civil Procedure 55(c)

(c) *Setting Aside Default.* For good cause shown the court may set aside an entry of default and, if a judgment by default has been entered, may likewise set it aside in accordance with Rule 60(b).

STATEMENT OF THE CASE

This action was brought by a shipper on behalf of a class of shippers for money refunds under certain motor common carrier tariffs involved in Interstate Commerce Commission Docket No. 34971 ("Docket No. 34971").[1] The suit was brought against seventeen named motor common carriers and a class of motor common carriers.

The Complaint was filed on June 15, 1970. (R. ¶ 1, Ex. A)[2] On February 25, 1972, the trial court found the action properly maintainable as a Rule 23(b)(3) class action both as to plaintiffs and as to defendants. Graves Truck Line, Inc. ("Graves") was an unnamed defendant class member. (R. ¶ 2)

On June 20, 1972, prior to the class determination and prior to any notice to the class, plaintiff moved for summary judgment on the issue of liability. On November 7, 1972, the trial court issued its order, and on November 21, 1972, its memorandum order, granting summary judgment on the issue of liability and continuing the case on the issue of damages only.

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[1] Motor common carriers participating in Middlewest Motor Freight Bureau tariffs were subjected to the rate schedules in Docket 34971. The tariffs involved were generally applicable on freight handled from, to, and between points in the "Middlewest territory," an eleven state area.

[2] References are to an Agreed Statement as Record on Appeal utilized below.

On June 18, 1973, the trial court ordered notice with opt-out provisions sent to members of the defendant class. (R. ¶ 4) Graves opted out of the class on October 23, 1973. (R. ¶ 5) Graves was thereafter, on June 21, 1974, served with a summons and complaint. (R. ¶ 16) Graves did not answer or otherwise appear in response to the summons. (R. ¶ 7)

On or about August 14, 1975, Graves received a copy of a motion for a "default order" together with a proposed order. (R. ¶ 8, Ex. B) A copy of the order appears as Appendix D. The proposed order provided that shippers should file refund claims with counsel for plaintiff-respondent. Upon application by counsel, the clerk of the court would enter a default judgment in the amount claimed, together with interest and a percentage figure for attorneys' fees. Defendants who were properly before the trial court and who were not in default attempted to object to the default procedure proposed by plaintiff-respondent. They were informed by the court that they had no standing to do so. The court stated that such a challenge would have to be made by a defaulted carrier. (R. ¶ 9)

Graves received no notice of the actual entry of the proposed order on September 25, 1975, no notice of any claims filed pursuant to the order, and no notice of any judgments entered by the clerk pursuant to the order. (R. ¶ 8) Graves' first notice of claims or judgments against it was notification in May of 1976 by Sears, Roebuck & Co. ("Sears") that Sears had received a garnishment summons and would withhold funds due and owing Graves. (R. ¶¶ 11-13)

Upon notice by Sears, the garnishee, to Graves of the issuance of a garnishment summons, Graves moved to quash the garnishment summons and to vacate the underlying default order. On May 12, 1977, the trial court entered an order denying Graves' motion to vacate the default order, but staying garnishment proceedings pending final determination of all matters in the case since appropriate final judgment findings had not been made pursuant to F. R. C. P. 54(b).

The trial court did not rule on Graves' contention that the default judgment was void because its entry violated Graves' right to due process of law, finding that "This Court is reluctant to review the actions of another judge of this Court . . ."[3] The court denied Graves' contention that the default judgment was entered in violation of F.R.C.P. 54(c) requiring that a default judgment be entered only for the relief prayed for in the demand for judgment in the Complaint, and denied Graves' contention that the default judgment violated F.R.C.P. 5(b)(1) and (2) in that the judgment is not for a sum certain which may be entered by the clerk, but for an unliquidated amount, and is of a nature which requires the trial court to determine the amount of damage.[4] (R. ¶ 15, Ex. 7)

Graves appealed. On April 18, 1978, the Court of Appeals for the Seventh Circuit affirmed the trial court's order. The court did not write an opinion, but ruled from the bench. A copy of the transcript of argument and ruling appears as Appendix C. The basis for the affirmance was not in many respects clear. A petition for certiorari was filed in this Court on July 17, 1978, and denied on October 2, 1978, 439 U. S. 862.

On October 16, 1978, a final order of dismissal was entered in the case allowing all default orders previously taken by plaintiff (in addition to the one order subject of the previous appeal) to become final enforceable judgments. Two hundred eighty two judgments were entered against Graves.[5]

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[3] The default order had been entered by a prior judge then recently deceased.

[4] The trial court agreed that the judgment was for an unliquidated amount, but found that the fact that the court ordered the clerk to enter judgment in whatever amount plaintiff-respondent submitted (plus an arbitrary percentage figure for attorneys' fees) was a sufficient judicial scrutiny to satisfy the provisions of F. R. C. P. 55(b)(2).

[5] Together with 282 more for attorneys' fees on each claim.

On or about December 14, 1978, plaintiff filed with the clerk of court a number of wage garnishment summons. Sears was the garnishee of all of the filed summons relating to Graves. Upon notice of those enforcement of judgment proceedings, and on January 2, 1979, Graves filed a motion in the trial court, supported by an uncontested affidavit by Graves' general traffic manager[6] for relief from judgments. The trial court ruled on that motion on April 30, 1979. A copy of that ruling appears as Appendix B. The trial court rejected Graves' arguments concerning violation of due process and the Federal Rules of Civil Procedure, finding them to have been previously ruled upon. The court considered Graves' argument as to the jurisdictional statute of limitations, but found that the statute had not expired at the time Graves was served with a summons and complaint in June of 1974.

An appeal was taken from that order to the Court of Appeals for the Seventh Circuit, which entered an opinion affirming the trial court on November 25, 1980. A copy of that opinion appears as Appendix A. The court held that the statute of limitations in 49 U. S. C. § 16(3)(f) was a jurisdictional statute of limitations. It further found that, based upon the holding in *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538 (1974), the statute was tolled from the time that the class action was filed on June 15, 1970, until after the class defendants were notified of the pendency of the action and opted out, or in Graves' case until October 23, 1973. Had the statute not been so tolled, it would have run under the authority of the Seventh Circuit in *Container Corporation of America* v. *Admiral Merchants Motor Freight, Inc.,* 439 F. 2d 825 (7th Cir. 1973), *cert. denied,* 94 S. Ct. 581 (1974), on December 27, 1972.

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[6] Contrary to the one default order involved in the previous appeal, large numbers of the subsequent judgments were factually invalid for various reasons, such as that the claim was already paid, judgment was taken twice on the same claim, the claim was *res judicata* in other litigation, the claim was not against Graves, the claim involved intra-state shipments, etc.

The Seventh Circuit further found, with respect to Graves' contention with regard to violations of the Federal Rules of Civil Procedure that service of the proposed default order upon Graves amounted to an amendment to the plaintiff's otherwise open-ended prayer for relief, that Graves could have calculated its own maximum liability, and that the fact that claims filed by shippers should be verified protected Graves from fraudulent claims. Thus there were no due process problems and no problems under Federal Rules of Civil Procedure 8(a)(3). It further found that altering the open-ended nature of the complaint to something formulaically more precise (i.e., the terms of the proposed default order), was not a new or additional claim pursuant to Rule 5(a) requiring new service upon Graves in the same manner as a summons. With respect to Graves' arguments about Rule 54(c), that the default judgment may not be entered in an amount to "exceed" that prayed for, the Seventh Circuit again relied on the formula proposed and Graves' ability to calculate its own maximum liability. There was also a ruling with respect to Graves' Rule 55 claims, which are not being renewed in this Court.

REASONS FOR GRANTING WRIT OF CERTIORARI

The Statute of Limitations Should Not Be Tolled As to Unnamed Class Defendants From the Time of the Filing of the Class Action to the Time of Opt Out

Importance of the Issue. The complex questions of procedure raised in defendant class actions are problems of increasing importance for the courts. Exact statistics are unavailable, but a perusal of advance sheets and other legal publications seems to indicate that, although plaintiff class actions may be on the wane, defendant class actions are becoming an increasingly useful tool. Typical of these cases are environmental litigation and the various "industry liability" cases, such as the "DES" cases. See, *e.g., Payton* v. *Abbott Labs,* 83 F. R. D. 382 (D. Mass. 1979). Another indicator of the importance of defendant

class actions is the growing legal literature on the topic. See, *e.g.*, Wolfson, *Defendant Class Actions,* 38 Ohio St. L. J. 459 (1977); Parsons & Starr, *Environmental Litigation and Defendant Class Actions: The Unrealized Viability of Rule 23,* 4 Ecology L. Q. 881, (1975); Anderson & Roper, *Limiting Relitigation by Defendant Class Actions from Defendant's Viewpoint,* 4 John Marshall J. Prac. & Proc. 200 (1971); Note, *Defendant Class Actions,* 91 Harv. L. Rev. 630 (1978); Note, *Federal Rule of Civil Procedure 23: A Defendant Class Action With a Public Official as the Named Representative,* 9 Valparaiso U. L. Rev. 357 (1975); and the numerous defendant class cases cited therein. The problem of unnamed class defendants and the statute of limitations is thus one that will have continuing and significant impact.

Conflict Between the Circuits. While there is no conflict among the circuit courts themselves as to the tolling doctrine, there is a conflict between the Seventh Circuit Court of Appeals and lower courts in other circuits. This case appears to be the first circuit court ruling on the tolling question in a defendant class case. There is, however, a directly contrary decision from a district court in the Third Circuit. In *Chevalier* v. *Baird Savings Association,* 72 F. R. D. 140 (E. D. Pa. 1976), the initial complaint named a class of defendants. The defendant class was not certified. In deciding when the statute of limitations was tolled for plaintiff-mortgagors, the court held that the statute was not tolled until the particular defendant was named and served in the second (and the third) amended complaint.

> Otherwise, defendants would be required to defend against actions of which they had no knowledge whatsoever until after the statute of limitations had run. 72 F. R. D. at 155.

And, in an explanatory note, the court stated:

> Nor do we think this conclusion is affected by the fact that the initial complaint purported to sue a class of defendants. It is not until a class is certified and notice sent that members are expected to be aware of the action or exercise any of the attendant rights or duties. Cf. *American Pipe, supra,* 414 U. S. at 552. 72 F. R. D. at 155, n. 45.

See also *Hellerstein* v. *Mather,* 360 F. Supp. 473 (D. Colo. 1973), in which the court held that the statute of limitations was tolled by the filing of a class action in favor of members of the plaintiff class and against defendants named in the action, but was not tolled against defendants who were not named.

Need for Exercise of Superviosry Powers With Respect to the Application of the Federal Rules of Civil Procedure. Finally, and perhaps most significant, this case raises important federal jurisdictional and procedural issues calling for exercise of the supervisory power of this Court. In deciding the tolling issue in accordance with *American Pipe & Construction Co.* v. *Utah,* 414 U. S. 538 (1974), the Seventh Circuit concluded that there was a

> . . . true conflict between the operation of the statute of limitations and Rule 23. This conflict can be resolved only by the promotion of one rule at the expense of the other, unless due process considerations require a particular result. . . .
>
> We are persuaded that implicit in the Supreme Court's *American Pipe* decision was the court's determination that "effectuation of the purpose of litigated efficiency and economy," (which Rule 23 was designed to perform) transcends the policies of repose and certainty behind statutes of limitations. 414 U. S. at 556. We are guided by that conclusion in the instant case to hold that where a class action suit is instituted against a class of unnamed defendants, pursuant to Rule 23(b)(3), the statute of limitations is tolled as to all putative members of the

> defendant class. Where, as here, the class is ultimately certified, we hold that the statute is tolled as to any particular defendant until such time as he is notified of the suit and chooses to opt out.
>
> A contrary rule would sound the death knell for suits brought against a defendant class, nullifying that part of Rule 23 that specifically authorizes such suits. This, in turn, would have a potentially devastating effect on the federal courts. Plaintiffs would, in each case, be required to file protective suits, pending class certification, to stop the running of the statute of limitations. . . . ____ F. 2d at ____ (7th Cir. 1980), App. A at 10a-11a.
>
> * * * *

Clearly, the Seventh Circuit reads this Court's decision in *American Pipe* as establishing the general proposition that the policies of Rule 23 are superior to that of statutes of limitation enacted by Congress and that the Rule supersedes inconvenient statutes of limitations. The plaintiffs in this case, contrary to the mandate of Rule 23 that a class determination is to be made "as soon as practicable after commencement of the action," did not secure a ruling on the class questions until nearly two years after commencement of suit, did not send notice to unnamed members of the defendant class until three years after the commencement of the suit, *after* the statute of limitations would otherwise have expired, and *after* the issue of liability had been determined adversely to the members of the putative defendant class. Notwithstanding the fact that no notice was sent until after the ability of class members to defend themselves had been substantially compromised, the Seventh Circuit has held that the statute of limitations was tolled by the mere filing of the complaint. The court makes no suggestion that tolling is dependent upon actual, or even constructive, notice of pendency of the suit. There is no discussion of the plaintiff's responsibilities under Rule 23, and the decision below makes clear that, in the view of the Seventh Circuit, tolling is available even to plaintiffs who totally fail to discharge their obligations under Rule 23.

Furthermore, whatever may be the case with the usual statute of limitations, it is undisputed that the statute involved in the instant case is *jurisdictional* in character. Thus, the Seventh Circuit's elevation of the policies of Rule 23

(1) in a *defendant* as opposed to a plaintiff class case;

(2) for relief in a *(b)(3)* context, the successor to the "spurious" class provisions; and

(3) for *individual relief* against defendant class members in the nature of *damages,*

is an improper extension of the jurisdiction of the federal courts in violation of Federal Rule of Civil Procedure 82. It is also destructive of the essential harmony of the Federal Rules of Civil Procedure which have, for sound policy reasons—and for the protection of plaintiffs—been carefully constructed to protect the rights of defendants, who are, by definition, involuntarily before the court. The conflict between the Seventh Circuit decision and the Federal Rules cries for the guidance of this Court, which is the final arbiter of the scope and application of the Federal Rules.

The Seventh Circuit's Decision Sanctions and Invites Gross Abuse of Rule 23 By Plaintiffs Who Fail to Seek Expeditious Class Determination. The Seventh Circuit held that there was a conflict between Rule 23 and statutes of limitations. Any such conflict is significantly diminished—if not eliminated entirely—as long as plaintiffs and trial courts adhere to the requirements of Rule 23. Ordinarily, if the question of class determination is the first order of business in the case as it ought to be, that issue should be resolved and notice given to the members of the class at a very early point. It is only when there are substantial delays in the class determination that problems of the intervening expiration of statutes of limitations are likely to arise. This case is a text-book illustration of the vice of delay in the class determination, but that vice does not arise from any

inherent conflict between Rule 23 and statutes of limitation. By permitting tolling without reference to adherence to the Rule 23 requirements, the ruling below invites plaintiffs to sue defendants as a class, naming a straw man as defendant, and deferring class determination and notice until liability issues have already been decided. At that juncture, unnamed members of a defendant class are presented with a Hobson's choice: they can stay in the class where they have already been held liable and argue about how much they owe; or they can opt out of the class, be sued individually and be confronted with the argument that the decision in the class action is law of the case.

Furthermore, the parade of horribles advanced by the Seventh Circuit—a deluge of protective suits pending class certification—would be obviated by simple adherence to the Rule 23 requirement of expeditious class certification.

The question of tolling in a defendant class context is somewhat analogous to the problem of adding parties defendant and the relation-back problem covered in Rule 15(c). That Rule provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. *An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.* (Emphasis added)

It is plain that the requirements for the relation back of amendments are much more stringent with respect to changes of defendants ("the party against whom a claim is asserted") then they are concerning changes of plaintiffs. A survey of the law concerning changes in party after a statute of limitations has run has concluded:

> Changes in parties defendant, as a rule, are much less likely to be permitted by the courts than changes in parties plaintiff. This restrictive tendency is equally noticeable in cases involving the addition, the substitution, and the intervention of new parties defendant. Annot., 8 A. L. R. 2d 6, 29 (1949).

Among the hundreds of change-in-party cases cited in the annotation and its supplements, *id.* 6-188 (1949 and Supps. 1971, 1980) the most analogous to the class cases are those cases filed against fictious "unknown" defendants. The federal courts have held pursuant to Rule 15(c) that amendments of "John Doe" complaints to substitute the real names of the defendants do not relate back to the commencement of the suit, absent notice. *Britt* v. *Arvanitis,* 590 F. 2d 57 (3d Cir. 1978) (product liability suit against "John Doe" as "manufacturer of wire surgical sutures"); *Sassi* v. *Breier,* 584 F. 2d 234 (7th Cir. 1978) (civil rights suit against "unknown and unidentified members of the Milwaukee Police Department designated as John Doe and Richard Roe, et al."); *Craig* v. *United States,* 413 F. 2d 854 (9th Cir. 1969) (products liability case [death on the high seas] against John Doe manufacturer). The same reasoning should prevent the tolling of a statute of limitations against unnamed defendant class members, or Rule 23 will sanction the very kind of abuses that a 1966 amendment to Rule 15(c) (adding the italicized language above) was designed to prevent. Committee Note to 1966 Rule 15(c), 3 Moore's Federal Practice, ¶ 15.01[8], page 15-11.

The Seventh Circuit's Decision Unlawfully Extends the Jurisdiction of the Federal Courts. Federal Rule of Civil Procedure 82 provides that the Federal Rules "shall not be construed to extend or limit the jurisdiction of the United States district courts or the venue of actions therein." The option of the Seventh Circuit for the primacy of the general provisions of Rule 23 over strict observance of a jurisdictional statute of

limitations raises a serious question whether the rules are not being used to extend the jurisdiction of the district courts over cases which would otherwise be outside of their jurisdiction.

This is particularly true in the case of this statute of limitations, Interstate Commerce Act, 49 U. S. C. § 16(3)(f). The statute is a clear expression of legislative intent. As noted above, it is jurisdictional and it cannot even be waived. *Midstate Horticultural Co.* v. *Pennsylvania Railroad,* 320 U. S. 356 (1943); *Wisconsin Bridge & Iron Co.* v. *Illinois Terminal Co.,* 88 F. 2d 459 (7th Cir. 1937); *Carothers* v. *Western Transportation Co.,* 412 F. Supp. 1158 (S. D. Ill. 1976).

Elevation of Rule 23 over jurisdictional statutes has been rejected by this Court. Twice, in *Snyder* v. *Harris,* 394 U. S. 332 (1969), and again in *Zahn* v. *International Paper Company,* 414 U. S. 291 (1973), the court held that in diversity actions, claims of individual class members cannot be aggregated to meet the jurisdictional amount requirements of 28 U. S. C. § 1332. The basis for these decisions is that "[t]he interpretation of that statute cannot be changed by a change in the Rules." *Snyder* v. *Harris,* 394 U. S. at 338. That rationale is equally applicable here, and the Seventh Circuit's elevation of Rule 23 over the jurisdictional statute of limitations contained in the Interstate Commerce Act must be reversed.

The Seventh Circuit Decision Conflicts With the Policies Behind Both Rule 23 and the Statute of Limitations. In addition to the legal question of jurisdiction, there are sound policy reasons for not reaching the result of the Seventh Circuit. Neither the policies behind the statute of limitations nor the policies of Rule 23 are served by the Seventh Circuit's application of the tolling doctrine. Contrary to one's expectations in a *plaintiff class* context, no named defendant has any obligation to unnamed class defendants. No named defendant may have any particular interest in or obligation to assure that the defendant class is certified "as soon as practicable after the

commencement of an action" as required by Rule 23(c)(1). While situations could be imagined where named defendants would want the class certified, situations can equally be imagined where they would not want the class certified, or more commonly, just not care. No named defendant has any obligation to ascertain defenses or other strategic information with regard to any unnamed class defendant, and, as in this case where judgment on liability was entered prior to certification, much can be done to compromise those defenses or strategies before the unnamed defendant has knowledge of the suit. Finally, there is great doubt that such obligations could constitutionally be placed upon named defendants.

The policies of the statute of limitations are not served either. The policy behind the statute of limitations is to prevent stale claims and to provide that claims shall be brought within such a period of time that the other party is able to protect itself. Here, unnamed defendants in the position of Graves had no official notice of potential liability prior to the time the statute of limitations ran. This was not a case in which defendant class members were difficult to identify. A list of defendants subject to the particular rate increases was always available from the Interstate Commerce Commission. The unnamed, unnotified defendant class members were unable to protect themselves (a) by retaining documents; (b) by keeping track of witnesses; or (c) by setting aside reserve funds to prepare for potential liability. Not only is a defendant without notice at a serious disadvantage in terms of preparation for litigation, but also it may have, thinking the statute of limitations had long run, affirmatively destroyed documents or other records.[7] While preparation, and retention of potential evidence are important, reserve funds are even more important since an aggregate of small claims can amount to a staggering liability.

[7] Most companies now have automatic document destruction policies.

A major business disruption of that sort will not only effect the alleged "wrongdoer" but also innocent third parties such as stockholders. In a legal system minutely concerned with the information which gets to stockholders, would Congress have allowed a situation where enormous potential liability may accrue without a defendant or anyone else knowing or being able to prepare for it, and which might work to the direct detriment of stockholders? If Graves' argument about the statute of limitation is not eventually upheld, any corporation may be subject to huge unknown liabilities. The very possibility of liabilities of that magnitude which cannot be protected against may have an unsettling effect upon the economy of doing business in this country.

The Seventh Circuit's Erroneous Interpretation of Federal Rules of Civil Procedure 5(a), 8(a)(3) and 54(c) is a Serious Blow to the Essential Harmony of the Rule Structure

The Federal Rules are solicitous to protect the rights of defendants, including defendants in default. The Rules recognize that default is a course of conduct a defendant may consciously determine to take, and has the right to take, and includes provisions designed to insure that a defaulting defendant is adequately apprised of the consequences of its action. *Bass* v. *Hoagland,* 172 F. 2d 205 (5th Cir.), *cert. denied,* 338 U. S. 816 (1949); *United States* v. *Fong,* 182 F. Supp. 446 (N. D. Cal. 1959), *aff'd,* 300 F. 2d 400 (9th Cir.), *cert. denied,* 370 U. S. 938, (1962).

When a defendant is served with a summons and complaint, and makes a determination to appear and defend, or to default, it has the right to rely on the applicability of existing law and on the applicability of the existing Federal Rules of Civil Procedure. At the time Graves was served with summons and complaint here, the complaint prayed for the following relief:

> F. For judgment against all of the defendants herein in an amount to be determined by this Court, together with interest, attorneys' fees and cost of suit.

The complaint was thus an "open-ended" complaint.

Graves was finally served with the summons and complaint in June of 1974. Graves would have determined that the jurisdictional statute of limitations on the rebate claims expired on December 27, 1972. Graves would reasonably be able to assume that the statute of limitations would render any judgments void and in any event was an issue which could be raised collaterally. Graves would also have determined that a judgment of liability was already entered against it and affirmed in other related cases, *Admiral-Merchants Motor Freight, Inc.* v. *United States,* 321 F. Supp. 353 (D. Colo.), *aff'd,* 404 U. S. 802 (1971); *Aluminum Co. of America* v. *Admiral Merchants Motor Freight, Inc.,* 486 F. 2d 717 (7th Cir.), *cert. denied,* 414 U. S. 1113 (1973). Appearing to contest liability, thus must have appeared a useless gesture. Furthermore, appearing at that point in the action would have required the expense of hiring foreign counsel and would have subjected Graves to all orders of the court. The court had previously ordered named defendants to provide extremely time consuming and expensive discovery to plaintiff. Named defendants had objected and even appealed that question. On a ruling against them by the Seventh Circuit, the named defendants entered into a settlement. Thus Graves, given all these factors, might have seen no point in appearing and substantial disadvantages in doing so.

If Graves then looked at the Federal Rules of Civil Procedure, it would have found that they were quite clear on several points. Rule 8(a)(3) was clear that the complaint should contain "a demand for judgment for the relief to which [a pleader] deems himself entitled." Rule 54(c) was clear that "[a] judgment by default shall not be different in kind from or

exceed in amount that prayed for in the demand for judgment." Rule 5(a) was clear that when a party was in default "pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4." Graves could legitimately and reasonably have expected further notice if and when the plaintiff came up with specific claims against Graves.

Rules 5(a), 8(a)(3) and 54(c) were not followed. The failure to follow those rules in entering a default judgment against Graves is a denial of due process at most and a clear violation of the Federal Rules of Civil Procedure at least. The Seventh Circuit did not find that the Rules were complied with, but did find that Graves' notice of the "proposed default order" which allowed for the payment of rebates, verified by sworn signature, plus 6% interest and 33% attorneys' fees amounted to a "de facto" amendment of the plaintiffs' prayer for relief obviating compliance. The court found, and without basis in the record, that the formula permitted Graves to calculate its maximum liability.[8] The sworn signature verification procedure,

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[8] The Seventh Circuit suggested that Graves could have made its own determination of liability. That is true, but only with enormous expense, time and difficulty. The determination of the amount and accuracy of claims is not a simple, easily performed procedure. While refunds due to shippers under Docket 34971 are theoretically mathematically calculable, that calculation involves a highly complex analysis which can be performed only by competent, trained, experienced freight clerks. Testimony was offered at a hearing on April 17-18, 1973 as to the effort required to determine whether a refund was due under Docket 34971, or, if due, in what amount (Tr. 139-148, 253-260). (The citation refers to pages in a Joint Appendix from the previous appeal in the Seventh Circuit, 73-165). At that hearing, it was estimated that the amount of resource material which a qualified rate clerk would need to examine bills to make such a determination would occupy 12 to 18 feet on a bookshelf. The difficulties involved in the calculation are many:

1. Carriers ship under interstate and/or intrastate tariffs other than those published by the Middlewest Motor Freight Bureau.

Footnote continued on following page.

the court found, would protect Graves from fraudulent claims that might have invalidated the shipper's calculation.[9] The Seventh Circuit found that Rule 54(c) was further not violated because since the complaint had no ceiling when Graves chose to default, Graves cannot be heard now to complain that the complaint was open-ended or that judgment "exceeded" that prayed for. Finally, the Seventh Circuit found with respect to Rule 5(a) requiring new or additional claims to be served in the same manner as a summons upon defendants in default, that the claims were not "new or additional claims for relief" requiring such service here.

The Seventh Circuit bases its decision with regard to Federal Rules 5(a), 8(a)(3) and 54(c) almost entirely on the

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Footnote continued from preceding page.

2. Not all of the Middlewest tariffs were involved in Docket 34971.

3. None of the tariffs that were involved in that docket applied to all points in a geographic area and many specific points were excepted from the normal application of the tariff. In addition, some shipments between points involved were covered by statutory and other exemptions.

4. Intrastate movements were not included in Docket 34971.

5. Some increases were rescinded, and some rates were further increased in the period of time which refunds were being claimed in this proceeding.

[9] The fact that it did not so protect Graves was ignored by the Seventh Circuit. There was an uncontested affidavit filed by Graves' General Traffic Manager showing that large numbers of the judgments entered against Graves (approximately 100) were factually invalid because the claim was already paid, judgment was taken twice on the same claim, the claim was *res judicata* in other litigation, the claim was made under intrastate tariffs or the claim was made under tariffs other than the ones involved in Docket 34971. Thus, not only were a large number of claims in error, but the corresponding judgments for interest and attorneys' fees would also have been in error.

fact that Graves had actual notice of the proposed default order in August of 1975. While "actual notice" may do something to counter Graves' due process argument, it does not and should not substitute for compliance with the Federal Rules of Civil Procedure. There is nothing basically wrong with filing an open-ended complaint. Indeed, in some cases where damages are not known at the beginning of litigation, it is the only way one could file a complaint. It is a different matter to say that a plaintiff may take a default judgment on such a complaint merely because the opposing party has "actual notice of a proposed procedure for determining amounts of claims and taking judgments." The Seventh Circuit suggested that Graves should have come to court when it received the "proposed order." That cannot be the cure in this or similar cases, however, as it is clear that should Graves have attempted to do so, it might not have been permitted to do so. Federal Rule of Civil Procedure 55(c) gives the court discretion upon an affirmative showing of "good cause" whether to allow a defendant in default to appear. Since Graves had no clear right to appear, the Seventh Circuit's suggestion is inappropriate.

Nor is the real solution difficult or burdensome. Since plaintiffs had at the time of the proposed default order, or necessarily must have had at some later point in time prior to taking the default judgments, actual knowledge of each of the claims it intended to enter judgment on, and the amounts thereof, it would have been a simple matter to list the claims and amounts, entitle the list "Amendment to the Complaint," and serve that amendment on Graves in the same manner as a summons. Had that been done, there would be no argument to be made under any of the three cited federal rules.

Indeed, in one case directly addressing the issue of the prayer for relief and default judgment, *Bowles* v. *Fode,* 8 F. R. Serv. 8a. 52, Case 1 (D. N. D. 1945), the prayer for relief asks "that the plaintiff recover for and on behalf of the United States against the defendant three times the amount by which the

price or consideration received by the defendant on the sales referred to exceeded the applicable maximum price fixed by the regulation." The action was one for treble damages under the Emergency Price Control Act. The court stated:

> In the event of defendant's failure to plead or otherwise defend, I cannot see how plaintiff could obtain a money judgment by default. That portion of Rule 54c underlined above specifically provides that a default judgment shall not exceed the amount prayed for in the demand for judgment. The demand for judgment herein is indefinite. It is not susceptible of ascertainment. At one and the same time plaintiff demands nothing and everything. The prayer asks that plaintiff recover three times the amount of the overcharges on an unknown number of sales, and nowhere is there any allegation as to the amount of such overcharges. The overcharges could amount to $10 or $10,000. Certainly Rule 54c . . . would prohibit entry of a default judgment for any amount because any amount would exceed that demanded in the complaint. 8 F. R. Serv. 8a 52, Case 1 at page 92.

See also *International Harvester Credit Corp.* v. *East Coast Truck,* 547 F.2d 888 (5th Cir. 1977); *Evans* v. *St. Louis Housing Authority,* 226 F.2d 750 (8th Cir. 1955).

The Seventh Circuit suggested that in interpreting Rule 5(a), the claims ultimately filed by plaintiff were not "new or additional claims." One could imagine a long semantic argument on the point. Perhaps the Seventh Circuit is even correct that the claims are not technically speaking "new or additional" claims. However, the language should not be interpreted so narrowly when the concern is with a defendant in default. Where a complaint is open-ended as here and the plaintiff proposes taking specific judgments in specific amounts, it should be required to file an amendment to the complaint changing the generic to the specific.

CONCLUSION

This Court should grant this Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 79-1640

APPLETON ELECTRIC COMPANY,
Plaintiff-Appellee,

v.

GRAVES TRUCK LINE, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.
NO. 70 C 1427—ALFRED Y. KIRKLAND, *Judge.*

Argued January 1, 1980—Decided November 25, 1980

Before PELL, *Circuit Judge,* PECK,[1] *Senior Circuit Judge,* and TONE,[2] *Circuit Judge.*

PECK, *Senior Circuit Judge.* This appeal considers whether 282 default judgments taken against appellant in a class action suit are void due to lack of subject matter jurisdiction or because the damages awarded exceeded the amount prayed for in plaintiff's demand for relief. And, if the first two issues are answered in the negative, whether the trial court abused its discretion in not setting aside a number of the default judgments that appellant contends come within the purview of Rule 60(b)5, Fed. R. Civ. P.

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[1] Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit Court of Appeals, sitting by designation.

[2] Honorable Philip W. Tone resigned April 30, 1980, and did not participate in this decision.

I

This case arises out of overcharges made pursuant to a tariff filed with the Interstate Commerce Commission to which appellant Graves Truck Line, Inc., (Graves), a motor common carrier, was a party. This action has a long and complicated history, the early part of which is chronicled in detail in *Appleton Electric Co. v. Advance-United Expressways,* 494 F.2d 126 (7th Cir. 1974), a previous decision in this case. We borrow as much of the description set forth there as will facilitate a basic understanding of the background of this dispute:

> The Middlewest Motor Freight Bureau, Inc., filed and published proposed rate increases on behalf of its motor carrier members to take effect on April 1, 1968. The Interstate Commerce Commission permitted the rates to go into effect as scheduled but, because of protests by various parties, instituted an investigation of the lawfulness of the increased rates without suspending them. By order of April 3, 1968, the Commission ordered specific information and data to be filed, prescribed special procedures and set the matter for hearing on May 20.

494 F.2d at 128.

In response to the carriers' request, the Commission postponed the hearing date, but did so conditioned upon the carriers' agreement to refund any portion of the rate increase subsequently disapproved. Following the postponed hearing, the Commission found that the increases were not just and reasonable, and ordered the carriers to refund the excess charges. The Commission later amended the order to require refunds to be made upon presentation of shippers' claims supported by paid freight bills or other appropriate evidence.

> The carriers sought judicial review of the Commission's order of June 5, 1969, as modifed by its order of August 29, 1969, by filing a complaint on January 26, 1970, in the United States District Court for the District of Colorado, seeking a declaration that the orders were

> invalid and an injunction against enforcement of the refund obligation by a three-judge court in accordance with 28 U.S.C. § 2325. On June 19, 1970, the district court granted a motion for a temporary restraining order. (Footnotes omitted.)

Id. at 129.

The three-judge court dismissed the complaint and entered judgment against the carriers, thereby upholding the Commission's order. *Admiral Merchants Motor Freight, Inc.* v. *United States,* 321 F. Supp. 353 (D. Colo. 1971). The Supreme Court of the United States affirmed the judgment on appeal without opinion at 404 U. S. 802, *rehearing denied,* 404 U. S. 987 (1971).

> This complaint was filed on June 15, 1970 by Appleton Electric Company and on behalf of all other persons similarly situated who shipped goods from May 20, 1968 through August 29, 1969 covered by the rates involved in Interstate Commerce Commission Docket No. 34971. Originally the complaint was directed against seventeen named motor carrier defendants, but the named plaintiff moved to amend the complaint on its face in order to add to the list of defendants the words "individually and on behalf of all others similarly situated." At the same time, plaintiff moved for a determination that the action be maintained as a class action.

494 F. 2d at 131.

The district judge found that the action was properly maintainable as a class action and defined both the plaintiff class and the defendant class on February 25, 1972.

> Although the complaint originally relied for jurisdiction on 49 U.S.C. § 304a (reparation proceedings), the plaintiffs on June 20, 1972 moved for summary judgment on the basis of 49 U.S.C. §§ 16(2) and 305(g) (enforcement of Commission order for payment of money). On November 21, 1972, the court issued its memorandum,

and on December 7, 1972, its order, granting summary judgment for the plaintiffs on the issue of liability and continuing the case on the issue of damages only.[3]

On December 20, 1972, the court appointed independent counsel to represent the defendant class other than the seventeen named defendants. On January 18, 1973, the court appointed the two attorneys previously representing the named plaintiff and another attorney to represent the plaintiff class.

On April 17, and 18, 1973, the court held an evidentiary hearing to determine reasonable methods of ascertaining and notifying class members. On June 18, 1973, the court ordered that notice be sent to members of the plaintiff class by first-class mail and to members of the defendant class by certified mail. . . .

Id. at 132.

We granted defendants' petition for leave to appeal from the June 18 order pursuant to 28 U.S.C. 1292(b). We affirmed the district court's judgment order, holding that the district judge had not abused his discretion in certifying this suit as a class suit, and that the notice contemplated by the June 18 order satisfied due process requirements. *Appleton Electric Co., supra,* at 139-40.

Appellant Graves received formal notice of its inclusion in the defendant class in August, 1973. The notice provided that any member of the defendant class could request exclusion

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[3] Prior to our disposition in *Appleton,* we affirmed summary judgment for shippers in eleven cases consolidated in this court on the ground that the judgment in *Admiral-Merchants Motor Freight, Inc.* v. *United States,* 321 F. Supp. 353 (D. Colo.) *aff'd,* 404 U.S. 802 (1971), was effective under the doctrines of res judicata and stare decisis as to carriers not parties thereto. *Aluminum Co. of America* v. *Admiral Merchants Motor Freight, Inc.,* 486 F.2d 717 (7th Cir.), *cert. denied,* 414 U.S. 1113 (1973). Thus, the issue of liability has never been contested on appeal in the case at bar.

from the class pursuant to the provisions of Rule 23(c)(2), Fed. R. Civ. P. Graves opted out of the class on October 23, 1973. On June 21, 1974, eight months after it opted out, appellant was served with a summons and complaint.

Graves did not answer the complaint and did not otherwise appear. On or about August 14, 1975, Graves was served with a motion for a "default order" together with a proposed order. The proposed order provided that shippers should file refund claims with counsel for plaintiff, and authorized the clerk of the district court to enter a default judgment in the amount claimed, together with interest and attorneys' fees equal to 33⅓% of the claim, upon application by the plaintiff-representative.

Again Graves failed to respond, and, on September 25, 1975, the district court entered the proposed order. On November 5, 1975, the first default judgment was entered against Graves. The district court refused to vacate the judgment, but stayed its enforcement pending final determination of all matters in the case.

The court subsequently certified, pursuant to 28 U.S.C. § 1292(b), that the procedure by which the September 25 default order was entered involved a controlling question of law, thus permitting immediate appeal from that order to this Court. We granted leave to appeal, and on April 17, 1978, this Court rendered its decision from the bench, affirming the district court's order.[4] Speaking from the bench, we said that Graves's jurisdictional defense should have been raised affirmatively at the pleading stage, and had, therefore, been waived. We further stated that the rules governing the entry of default judgments are satisfied where the district court utilizes a formula by which it can compute the exact amount of damages. In addition, we observed that Graves had notice of the formula

[4] An order affirming the district court for the reasons stated from the bench was issued the following day. *Appleton Electric Co.* v. *Graves Truck Line, Inc.*, No. 77-2155 (7th Cir. April 18, 1978).

to be used in computing damages, and that, with regard to the single judgment before us at that time, Graves conceded that it was accurate.

Thereafter, 282 default judgments were entered against Graves. After all judgments became final, appellant moved for relief from the judgments; this motion was denied by the district court. Graves appeals to this Court, again raising the issues disposed of on its last appeal. Additionally, Graves argues that at least 100 of the judgments are voidable for various reasons under Rule 60(b)(5), Fed. R. Civ. P.

II

The first question to be addressed is what effect we must give to our disposition on the prior appeal of issues that appellant urges us to reconsider here. We have long held that "matters decided on appeal become the law of the case to be followed . . . on second appeal, in the appellate court, unless there is plain error of law in the original decision." *Kaku Nagand* v. *Brownell,* 212 F.2d 262, 263 (7th Cir. 1954). The "law of the case" rule is not a limitation on this Court's power to reconsider its prior rulings in a case, but is:

> based on the salutary and sould public policy that litigation should ome to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.

White v. *Murtha,* 337 F.2d 428, 431 (5th Cir. 1967), *quoting Roberts* v. *Cooper,* 20 How., 61 U.S. 467, 481 (1858). Because "law of the case" is not an immutable rule, we have, on a limited number of occasions reconsidered a previous adjudica-

tion where we concluded that our former ruling was clearly erroneous. *See, e.g., United States* v. *Habig,* 474 F.2d 57 (7th Cir. 1973), and *Luminous Unit Co.* v. *Freeman-Sweet Co.,* 3 F.2d 577 (7th Cir. 1924).

We believe that our prior adjudication disposed of important issues of law that had not been considered by this Court in the past. We therefore reconsider those issues here to correct any uncertainty that may have resulted from our previous ruling.[5]

III

Plaintiff brought this action pursuant to 49 U.S.C. §§ 16(2) and 305(g). Section 16(3) of the same title lays down certain rules as to limitations of action. Both this Court and the Supreme Court have construed these limitations as jurisdictional, holding that the lapse of time not only bars the remedy but also destroys the liability. *See Midstate Horticultural Co.* v. *Pennsylvania R.R.,* 320 U.S. 356 (1943), and *Wisconsin Bridge & Iron Co.* v. *Illinois Terminal Co.,* 88 F.2d 459 (7th Cir. 1937).

It is fundamental that the federal courts are courts of limited jurisdiction, and that a lack of jurisdiction cannot be waived by the parties. Insofar as our pronouncement from the bench implied that Graves had waived its jurisdictional defense by failing to raise it in a timely fashion, we now perceive that we were in error. This does not, however, dispose of the matter. We believe that the statute of limitations was tolled by the filing of the original complaint, and did not begin to run again until appellant opted out of the defendant class. Since Graves was

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[5] Even though the prior decision of this court of April 18, 1978, was an unpublished order, because we have reconsidered the issues there presented, we have, pursuant to Circuit Rule 16(e), circulated this opinion among all judges of this court in regular active service. No judge favored a rehearing *en banc* on the matter of the reexamination of the issues.

subsequently served within the period provided in 49 U.S.C. § 16(3)(f), this Court was correct in the previous appeal in concluding that Graves's jurisdictional defense was without merit.

This suit was commenced by the filing of a class action complaint on June 15, 1970. In a related case, we held that the limitations period did not begin to run against any shippers until December 21, 1971. *Container Corp. of America* v. *Admiral Merchants Motor Freight, Inc.*, 489 F.2d 825 (7th Cir. 1973). Graves received its first formal notice of this suit in August, 1973, eight months after the one-year limit would have run, barring any application of the tolling doctrine.

Appellant contends that the statute was not tolled until it received formal notice of the suit. Those circuits that have considered the question whether notice is necessary to invoke the tolling doctrine have uniformly held that the filing of a complaint, in literal compliance with Rule 3, Fed. R. Civ. P., is sufficient to interrupt the running of a federal statute of limitations. Neither service of the complaint nor the summons on a defendant is necessary. In *United States* v. *Wahl*, 583 F.2d 284 (6th Cir. 1978), for example, the Court of Appeals for the Sixth Circuit held that the filing of a complaint within the limitations period tolled the statute even though the defendant was not served until three years after the statute of limitations had run. *See also Windbrooke Development Corp.* v. *Environmental Enterprises, Inc. of Florida*, 524 F.2d 461 (5th Cir. 1975); *Isaacks* v. *Jeffers*, 144 F.2d 26 (10th Cir.) *cert. denied*, 323 U.S. 781 (1944); and *Reynolds* v. *Needle*, 132 F.2d 161 (D.C. Cir. 1942).

In each of the cases cited above, the defendant was named in the complaint. In contrast to that situation, in *Sassi* v. *Breier*, 584 F.2d 234 (7th Cir. 1978), we held that an amendment to the pleadings after the limitations period had run, specifically naming a defendant designated merely as "John Doe" in the original complaint, would not relate back to the original

complaint. We there reasoned that "to hold otherwise could have an unwarranted impact upon the salutary purposes of statutes of limitations." *Id.* at 325.

The rules set forth in these cases provide only a starting point for our analysis, for no circuit, to our knowledge, has specifically addressed the issue of tolling in the context of a class action suit in which there is a class of unnamed defendants. *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538 (1974), is the seminal case on the application of the tolling doctrine in class action suits. There, the Supreme Court held that a class action suit filed on behalf of a class of unnamed plaintiffs tolls the statute of limitations as to all potential class members. If the class is certified, all putative members of the class remain parties until and unless they receive notice and choose not to continue. If the trial court determines that the class is inappropriate for class action status, the statute begins running at the time of that determination with regard to unnamed plaintiffs.

In justifying the rule announced in *American Pipe,* the Supreme Court reasoned that to hold otherwise would "frustrate the principal function of the class suit . . .—[curtailing] the multiplicity of activity which rule 23 was designed to avoid in those cases where a class action is found 'superior to other available methods for the fair and efficient adjudication of the controversy.' " 414 U. S. at 551. The Court noted that it felt its holding was not truly inconsistent with the operation of the statute of limitations. Where a named plaintiff commences a class suit, the court stated, defendants are thereby notified "not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment," all within the limitations period. *Id.* at 554-55.

American Pipe, of course, is not dispositive of this case, for the application of the tolling doctrine to a defendant class was not an issue there. We have found only one decision addressing

the statute of limitations problem in the context of a suit brought against a class of defendants. In *Chevalier* v. *Baird Savings Ass'n,* 72 F. R. D. 140 (E. D. Pa. 1976), the district court held that the statute of limitations is not tolled against unnamed members of a defendant class unless and until they are specifically named in an amended complaint. According to the court, "[o]therwise, defendants would be required to defend against actions of which they had no knowledge whatsoever until after the statute of limitations had run." *Id.* at 155.

We do not agree with the *Chevalier* decision. Unlike the Court in *American Pipe, supra,* we are confronted here with a true conflict between the operation of the statute of limitations and Rule 23. This conflict can be resolved only by the promotion of one rule at the expense of the other, unless due process considerations require a particular result. Our reading of the cases convinces us that due process is not offended by the tolling doctrine, even where a defendant has no notice of a suit until after the limitations period has run. *Cf. United States* v. *Wahl, supra.* The Supreme Court specifically rejected the contention that due process was abridged by the tolling doctrine in *American Pipe, supra,* 414 U. S. at 556-59.

We are persuaded that implicit in the Supreme Court's *American Pipe* decision was the Court's determination that "effectuation of the purpose of litigative efficiency and economy," (which Rule 23 was designed to perform) transcends the policies of repose and certainty behind statutes of limitations. 414 U. S. at 556. We are guided by that conclusion in the instant case to hold that where a class action suit is instituted against a class of unnamed defendants, pursuant to Rule 23(b)(3), the statute of limitations is tolled as to all putative members of the defendant class. Where, as here, the class is ultimately certified, we hold that the statute is tolled as to any particular defendant until such time as he is notified of the suit and chooses to opt out.

A contrary rule would sound the death knell for suits brought against a defendant class, nullifying that part of Rule 23 that specifically authorizes such suits. This, in turn, would have a potentially devastating effect on the federal courts. Plaintiffs would, in each case, be required to file protective suits, pending class certification, to stop the running of the statute of limitations. In the present instance, this could have resulted in the filing of a staggering number of complaints. As we stated in our decision affirming the district court's certification of both the plaintiff and defendant classes in the case at bar, "[t]he unparalleled, obstructive and duplicative efforts by the carriers to avoid paying refunds that by their nature should have been more or less automatically returned to shippers . . . [in] 1971, underscores the basic wisdom of Rule 23." *Appleton Electric Co., supra,* 494 F. 2d at 133.

IV

Graves contends also that the default judgments were entered in violation of the process that Graves was due under Rules 5(a), 8(a)(3) and 54(c) of the Federal Rules of Civil Procedure. This contention rests on the failure of the plaintiffs and of the district court to give Graves notice of any orders, claims or judgments filed after Graves received notice of the plaintiffs' proposed default order. Graves concedes that it was served with a specific summons and complaint, and that it chose not to answer this complaint or to appear before the district court.

The pertinent portions of the rules alleged violated are:

> (a) . . . No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

Rule 5(a), Fed. R. Civ. P.

> (a) A pleading which sets forth a claim for relief . . . shall contain . . . (3) a demand for judgment for the relief to which [the pleader] deems himself entitled. Relief in the alternative or of several different types may be demanded.

Rule 8(a)(3), *id.*

> (c) . . . A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment.

Rule 54(c), *id.*

Graves's basic argument, which relies on all these provisions, is that it had a "right" to default, and to do so knowing the exact liability flowing from this default. Graves did receive on August 14, 1975, a copy of the "proposed default order" which contained the following formula for reckoning the amount of the judgment to be entered against defaulting defendants: 100% of each verified overpayment to a defendant plus 6% interest per annum plus attorney's fees of 33⅓% of the sum of overpayments and interest. While the proposed order did not list damages against each defendant in cardinal numbers, it did allow each defendant to calculate its maximum liability. Graves was consequently able to weigh the advantages and disadvantages of defaulting, and chose to default. There is now no reason to set aside these default judgments.

To repeat: prior to its adoption by the district court, Graves received notice of the proposed order. The order defined the shipments for which overpayments had been made, the defaulting defendants to whom they had been made, and the date by which claims for reimbursement must be made. Claims made pursuant to this order were not "new or additional claims for relief" made without notice in violation of Rule 5(a).

There was no violation of Rules 8(a)(3) and 54(c), which are in this case complementary: the proposed default order which was served[6] upon Graves amounted to an amendment of the plaintiffs' prayer for relief. As already noted, this proposed order was definite enough to allow Graves to calculate its maximum liability, and the verification procedure incorporated by the district court's "default order" protected Graves from fraudulent claims that could have invalidated that calculation.

No known authority supports Graves's asserted proposition that defendants have a "right" to default and to know the exact measure of liability that will flow from a prospective default. That proposition cannot be deduced from the cited case of *Bass* v. *Hoagland,* 172 F. 2d 205 (5th Cir.), *cert. denied,* 338 U. S. 816 (1949). *Bass* dealt with the notice to defendants required by Rule 55(b)(2), which states that notice must be given prior to a hearing on a plaintiff's application for judgment, "[i]f the party against whom judgment by default is sought *has appeared in the action* . . . ." (Emphasis added). Neither *Bass* nor the portion of the Federal Rule it construes is apposite.

Insofar as Rule 55 bears in any way on this case, it implies that a trial judge may enter a default judgment even though a plaintiff's claim is not for a sum certain. Rule 55(b)(1) allows the court clerk to enter a default judgment when the plaintiff's claim "is for a sum certain or for a sum which can by computation be made certain. . . ." Rule 55(b)(2) requires that a default judgment be entered by the court "[i]n all other cases . . ."; Professor Moore was thus prompted to observe that "[t]he entry of a judgment by default should be by the court: if

---

[6] The record does not disclose whether this service was in the manner prescribed by Rule 4, Fed. R. Civ. P. However, it is uncontested that Graves received a copy of the proposed order weeks before it was entered by the district court. Graves has not challenged the propriety of the mode of service of this order. This defense has been waived. See Rule 12(h), Fed. R. Civ. P.

the claim is not for a certain or ascertainable sum . . ." (Footnote omitted). 4 J. Moore & W. Taggart, Moore's Federal Practice ¶ 55.05[1] at p. 55-51 (1979-80 ed.).

Graves's most persuasive procedural argument is its allegation that, contrary to Rule 54(c), the default judgments "exceed in amount that prayed for in the demand for judgment." Graves contends that the shippers' complaints were the sort of "open end complaints" disapproved in *Bowles* v. *Fode,* 8 Fed. Rules Serv. 89 (D.N.D. 1945). Putting aside the interesting question, can an unstated amount be exceeded, we repeat that the proposed default order received by Graves contained a formula by which Graves could calculate its maximum liability. This is the answer to the question posed in *Bowles* v. *Fode* of how a money judgment by default could be taken by plaintiffs who did not allege quantified damages. See *id.* at 92. (The question was purely hypothetical in *Bowles,* which was not a case involving default judgments.)

The apparent purpose of limiting default judgments to the amount prayed for is to protect defendants who choose to default, relying on the damage ceilings contained in plaintiffs' prayers. There is no such ceiling that Graves relied on in choosing to default, unless it be one of Graves's own calculation. Graves is thus not now succored by Rule 54(c).

V

Graves's final contention is that for numerous reasons roughly 100 of the default judgments against it are void or inaccurate in amount and should be vacated under Rule 60(b), Fed. R. Civ. P. A motion pursuant to this rule is directed to the discretion of the court entering the judgment, not, as Graves apparently believes, to the discretion of this Court. *E.g, United States* v. *An Undetermined Quantity of an Article of Drug,* 583 F.2d 942 (7th Cir. 1978). Our review of denial of motions under this rule is limited to determining if the district court abused its discretion. *E.g., De Filippis* v. *United States,* 567 F.2d 341 (7th Cir. 1977).

Since Graves has offered no more than its assertions that it had meritorious defenses to the challenged judgments, the district court has not abused its discretion in denying Graves's motion.

Affirmed. Costs to appellee.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Presiding Judge, Honorable ALFRED Y. KIRKLAND

70 C 1427 April 30, 1979

APPLETON ELECTRIC
vs.
ADVANCE UNITED

Motion for Relief from Judgment

Defendant Graves Truck Lines Inc., motion for relief from judgments, for an order requiring plaintiff to pay over to the Clerk of this Court, to hold monies paid to pursuant to any arguments, and for an order staying enforcement of any judgments against Graves pending the determination of this motion is denied in its entirety.

Kirkland, *J.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Presiding Judge, Honorable ALFRED Y. KIRKLAND

70 C 1427 April 30, 1979

APPLETON ELECTRIC COMPANY

vs.

ADVANCE UNITED EXPRESSWAYS,
GRAVES TRUCK LINE, INC., et al.

Defendant Graves Truck Lines, Inc.'s Motion for Relief from Judgments, for an Order Requiring Plaintiff to Pay Over to the Clerk of this Court, to Hold Monies Paid to Pursuant to Any Arguments, etc.

After careful consideration of defendant Graves' Motion and the arguments offered in support thereof, defendant Graves Truck Lines, Inc.'s Motion for Relief from Judgments, for an Order Requiring Plaintiff to Pay Over to the Clerk of this Court, to Hold Monies Paid to Pursuant to Any Arguments, and for an Order Staying Enforcement of any Judgments Against Graves Pending the Determination of this Motion is denied in its entirety.

The bulk of defendant Graves' arguments concern alleged violations of its right to due process of law and violations of the Federal Rules of Civil Procedure resulting from the entry of default orders and default judgments against it and the methodology and formula approved by this Court in determining the amount of damages to which members of plaintiff class are entitled. These arguments have been asserted to and rejected by this Court; (see Memorandum Opinion and Order of May 12, 1977) and to the Court of Appeals for the Seventh Circuit which affirmed this Court's holding (Order of April 18, 1978) and certiorari has been denied in this matter by the United States Supreme Court. This Court once again concludes defendant's arguments to be without merit.

The remainder of defendant's motion for relief from judgment pursuant to Rule 60(b)(4) and (6), Federal Rules of Civil Procedure, asserts matters more commonly considered as affirmative defenses including, running of the statute of limitations and barring of judgments under the doctrine of res judicata. However, even considering the substantive aspects of these matters, this Court concludes that defendant's arguments are without merit. Even viewing the relevant statute of limitations as jurisdictional (49 U. S. C. § 16(3)(f)), this Court holds that the statute was tolled from the filing of plaintiff's complaint in June 1970 until defendant Graves chose to opt-out of the certified class of defendants in October of 1973. Because defendant Graves' was served with a summons and complaint in June of 1974 with some four months then unexpired on the one-year statute of limitations, this Court is not deprived of jurisdiction over plaintiff's claim against defendant Graves.

Defendant's final contention in support of its motion, that the amount of attorneys' fees awarded on various judgments were not for a liquidated amount and thus the Clerk of the Court cannot enter this amount without a hearing at which defendant may contest the amount of the award, is without merit. The methodology and formula for determining the amount of attorneys' fees were subject to the same role of the District Court Judge as were the formula and methodology to be applied in computing the amount of judgment to be entered.

Kirkland, *J.*

APPENDIX C

U.S. COURT OF APPEALS

SEVENTH CIRCUIT—DOCKET

APPLETON ELECTRIC COMPANY, *Plaintiff-Appellee,* *v.* **GRAVES TRUCK LINE, INC.,** *Defendant-Appellant.*	No. 77-2155

REPORT OF PROCEEDINGS before the HONORABLE JUDGE SWYGERT, MOORE and SPRECHER, on the 4th day of April, A.D., 1978.

PRESENT:

MR. JAY A. CANEL
30 North LaSalle Street
Chicago, Illinois 60602
appeared on behalf of appellee;

MS. MARTHA M. JENKINS,
77 West Washington Street
Chicago, Illinois 60602
appeared on behalf of appellant.

JUDGE SWYGERT: Let me see—Ms. Jenkins, we read these briefs, so we know a little bit about the case, I guess.

Your adversary said, well, you had two opportunities to get into this case and you didn't do anything until you found out that you were defaulted and that you had that judgment against you, a garnishment. Why didn't, when you had that summons, why didn't you appear? Any reason?

MS. JENKINS: Your Honor, Martha Jenkins, I represent the defendant-appellant, Graves Truck Line. Our argument, of course, is based on the premise that a defendant is entitled to default, and I think there can't be any argument.

JUDGE SWYGERT: You mean under the Rules?

MS. JENKINS: Under the Rules.

JUDGE SWYGERT: Well, all right, but Judge Lynch wrote the order which would indicate that he formulated—he devised a formula for this very purpose of default, as I understand the argument.

MS. JENKINS: The defendant, Graves, was in default. He has been served—it has been served with a summons and complaint. It was in default.

The plaintiff, ex-parte, proposed that procedure to the Court. The other defendants, who were before the Court asked to oppose that procedure. They were told that they lacked standing to do so and that that could only be done by a carrier in default at such time that the carrier was before the Court.

I do not think Graves was under any obligation at that point to appear and challenge the proposed procedure by plaintiff.

JUDGE SWYGERT: He did have notice of it?

MR. JENKINS: He did have actual notice that the procedure was actually proposed, although he never did get any notice after that, and what the Court did with that procedure was to enter it without opposition.

JUDGE SWYGERT: Don't you think that if I get down a prospective defendant, of course, and for some liability, and it has been decided there is a liability, and I get a notice that it is going to—that I'm going—there is going to be a method of computation for the damages, that I better—if I don't like it, I better get over to the courthouse and protest.

Don't you think there was an obligation on Graves to do that?

MS. JENKINS: No, I don't think so, Your Honor. I think that goes directly—There are four possible results I think this Court could reach, favorable to my client. I think Mr. Canel will suggest the ones unfavorable.

The first and easiest result is that the judgment should be vacated under Rule 60(b)4 on the grounds that it is void because it is in violation of Rule 54 and 8(a)(3) and 5(a) and 54(c) says that a judgment may not be taken against the defendant in default or otherwise—in default which is different in kind or which exceeds in amount that which is in the prayer for relief in the complaint.

The prayer for relief in this complaint simply says that—asked for a judgment against all defendants herein in an amount to be determined by this Court together with interest, attorneys' fees and costs of suit. Rule 8(a)(3) requires that the complaint set forth a demand for the relief to which the pleader deems himself entitled.

Rule 5(a) specifically addresses the problem before the Court in this case, and it says that pleadings asserting new or additional claims against parties in default—and clearly this is a new or additional claim—once the plaintiff has come up with a specific money amount—

JUDGE _____: This is a pretty old complaint; this was a question of a refund that your client should have made years ago.

MS. JENKINS: That's true.

JUDGE _____: What's the big question about damages. There is no question about what the damages are.

MS. JENKINS: There certainly is a question. The complaint doesn't ask for any specific amount.

JUDGE _____: You could have figured it out and sent the money without a lawsuit.

MS. JENKINS: Well, that's one of the reasons there is a lawsuit, Your Honor. I admit this has been a long, complicated suit. This is the last disputed issue before any court in this suit. I think it violates the rules and it violates due process for the plaintiff to take this judgment following this procedure. I'm not saying the plaintiff can't or shouldn't have a judgment for the amounts to which his shippers are entitled. All I'm saying is that the way it has been gone about, it violates the rules and it violates due process.

If the plaintiff goes before the Court, and let me explain what the plaintiff now has. The plaintiff sent out a notice in an earlier point in this litigation soliciting any of the complaints that any of the shippers might have against any of the 1,400 defendants in this case; this would include Graves and all of the other defendants in default.

The plaintiff now has in his possession all of the complaints by shippers against the various defendants in default. All I'm suggesting is that the way the plaintiff should have gone about collecting those amounts is to go before the Court and serve some sort of amendment on each carrier in default saying these are the amounts of claims against you, I'm going to take a judgment, and that's required by Rule 5(a), I believe, as well as by the due process clause of the 14th Amendment; and at that point, Mr. Canel can take his judgment by default, the plaintiff—defendant, excuse me, in this case, Graves, would have notice of exactly what the plaintiff is claiming. If he

chooses to come in and contest that amount including interest and attorney's fees, that's fine. That's the defendant's option at that point, but at least he knows what is happening to him.

JUDGE SWYGERT: Is there any doubt that this computation is not correct and that you got stuck for more money than you should be paying?

MS. JENKINS: This particular computation?

JUDGE SWYGERT: Yes.

MS. JENKINS: This is only one claim.

JUDGE SWYGERT: Well, whatever, whatever we are talking about, is there a mistake in the computation?

MS. JENKINS: I don't believe there is a mistake in this particular claim. I do believe—

JUDGE SWYGERT: That's the only one we are talking about, isn't it?

MS. JENKINS: Yes.

JUDGE SWYGERT: I'm not talking if there are other claims; that's another lawsuit, another date, isn't it?

In this claim, what I'm asking you, is there any case that the amount that you got fined was—the judgment against you was in any amount in excess of what you actually owed by reason of a rate problem?

MS. JENKINS: This claim, an amount something over $2,000, I do not believe to contain any inaccuracies; however, this is only one of many claims which Mr. Canel may have against Graves.

Graves is estimating there may be as many as twenty-five to thirty thousand dollars in claims against it. It does not know how many of those claims Mr. Canel actually has. He could come back with all the rest of the claims. There may very well

be, for reasons I think I stated in some detail in my briefs at pages 11 through 13 in the original brief and page 5 of the reply brief, a great many inaccuracies.

In the prior history of this litigation in terms of claims that were filed by shippers indicate that that will happen.

JUDGE SWYGERT: Has there been defaults against you on those?

MS. JENKINS: He hasn't taken them yet, but—

JUDGE SWYGERT: Why don't you get in there and try to work it out with him. It seems to me you can head that off in a hurry, if there are any inaccuracies.

MS. JENKINS: We are not entitled—The way this procedure has been going about, we will never know that this claim is there until there has been a garnishment or other enforcements of judgment proceedings. We don't have any notice of the judgments or the claims or anything until the plaintiff pursues one of the methods provided by the rules for enforcing the judgment.

JUDGE SPRECHER: Don't you have to meet the requirements to overlook a default judgment to show that there is a meritorious defense and that there is a gross inaccuracy in this amount. Now if you can see that the amount is correct, what remains for you as the basis to ask the Court is indulgence to open up to default.

MS. JENKINS: Your honor, we are talking about one claim which is going to be the first of a large number of claims both against this defendant and other defendants in default. We are talking about the procedure—

JUDGE SPRECHER: As Judge Swygert says, that's both in futuro and not before us.

MS. JENKINS: We are talking about the procedure by which the plaintiff is going to do this. I think it would be best to resolve the validity of the procedure at this point, so that we don't come running up with every claim to this Court or to the trial court raising the same arguments.

JUDGE SWYGERT: Suppose we agree with you that it would have been better to send these questions and claims to a special master or magistrate? That's not before us.

MS. JENKINS: We are talking about Graves' right to notice and the opportunity to be heard.

JUDGE SWYGERT: You had two opportunities, didn't you have two opportunities, at least?

MS. JENKINS: Under the rules, I think Graves was entitled to service in specific amount demanded by plaintiff under Rule 5 (a). I also think that that's true as a constitutional matter.

We are talking about a void judgment, Rule 60 (b) 4, which I don't believe requires a showing of meritorious defense. If a showing of meritorious defense were required, I think that I have suggested in my reply brief, and I'm embarrassed because we didn't suggest it in more detail earlier that we do have a meritorious defense in the statute of limitations and that is that this is the jurisdictional statute—

JUDGE SPRECHER: Well, that goes to the merits. You are here before us quibbling—or not quibbling, but saying that you haven't had due process because there was no opportunity for you to defend against the specific amount of the claim.

JUDGE SWYGERT: That limitation question—You got a summons, didn't you?

MS. JENKINS: Sure.

JUDGE SWYGERT: You didn't do anything about it, right?

MS. JENKINS: Correct.

JUDGE SWYGERT: Then you got an order, then you got notice that even after you had been defaulted, how the default was going to be—the mechanics of computation, right?

MS. JENKINS: That's correct.

JUDGE SWYGERT: Did you do anything—You didn't do anything about that. Now today you are saying there was a defense of limitations. There used to be a theory or proposition that that's an affirmative defense and you have got to raise it, and you can't raise it, it seems to me, at this late date.

MS. JENKINS: That would be true if it were a procedural statute of limitations. I don't think it's true with a jurisdictional statute.

In any event, there is not only the question of the amount of this claim, in terms of the amount of the refund, but there is also a question of attorneys' fees as to which there was no hearing held.

JUDGE SWYGERT: Wasn't that in this formula?

MS. JENKINS: That was an arbitrary figure set by the plaintiff and approved by the Court.

JUDGE SWYGERT: I know, but you didn't quite answer me. Was it in the formula that you got?

MS. JENKINS: Yes.

JUDGE SWYGERT: It was.

MS. JENKINS: Besides my argument that the entry of judgment in a specific amount here which is not prayed for violates Rules 54, 8 and 5, we make the additional argument that the entry of this judgment violates Rule 55(b)(1) and (2), in that, under one, this amount could not have been entered by the clerk because the party was in default; and under (b)(2) it was not sufficient scrutiny by the Court merely to approve an ex parte formula suggested by plaintiff to have very complicated claims filed, which would not be reviewed by the plaintiff or anybody as to their accuracies, whether they were sworn and verified, whether they were supported by paid freight bills or other appropriate evidence whatever that might be, or in any other way for their accuracy. To determine the accuracy of these claims, that would take a qualified rate clerk.

If Your Honor has no other questions, I would like to save the rest of my time for rebuttal.

(Off record discussion)

JUDGE SWYGERT: We have consulted among ourselves and come to the conclusion that the judgment should—that this judgment should be affirmed. I am going to say a little bit about it, and then I'll let Judge Sprecher and Judge Moore say what they think, if they want to say anything in addition.

First, the defendant here got summons and this case was in existence; they knew it ahead of time, I think, but in any event, they got a specific summons, as I understand the record, and then Graves also got a notice that anyone that hadn't appeared and hadn't defended and was in default, that there was going to be a formula on how these judgments in default—I mean how this default amount would be computed including the percentage and attorneys' fees.

Graves deliberately and advisedly ignored that notice. Then there was a finding when there was a garnishment proceeding that—that took place. Then Graves becomes concerned and precipitates these proceedings which we now have under review.

I can't believe that in this case there was any want of process. I think the rule that was involved here was complied with. It doesn't say that you have to have a liquidated amount. As I understand it, it means that if the Court can compute it, the amount, by computation, that he can then enter a default, and this formula was specific, the amounts were presented, and on concession here the appellant says that there was no—that the amounts were accurate, so it seems to me that there is no other way we could affirm—but affirm, and on the statute of limitations question, that seems to me was something that could have been raised, but wasn't; but now it's too late day to assert.

There may be some other observations that my brothers would want to make, and so I'll ask Judge Moore if he has anything that he would like to say.

Judge, do you want to say anything?

JUDGE MOORE: I concur.

JUDGE SWYGERT: The judgment will be affirmed.

JUDGE SPRECHER: And an order will be entered.

(Which were all the proceedings had in the above-entitled cause on said day.)

* * * *

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

APPLETON ELECTRIC COMPANY, *Plaintiff,* **v. ADVANCE-UNITED EXPRESSWAYS, et al.,** *Defendants.*	No. 70 C 1427

ORDER

This cause was heard on the motion of APPLETON ELECTRIC COMPANY, individually and on behalf of all members of the plaintiff class, due notice having been served and the Court being fully advised in the premises;

IT IS HEREBY ORDERED THAT:

1. The defendants named in the attached Schedules "A, B, C, D and E" are hereby defaulted for failure to appear and/or to answer the plaintiff's complaint.

2. All defendants referred to in Schedules A, B, C, D and E of paragraph 1 above are hereinafter referred to as "Defaulted Defendants."

3. Any member of the plaintiff class (hereinafter referred to as "Claimant" or "Shipper") who desires to make a claim for refund against any Defaulted Defendant, as defined in this Order and as defined in this Court's order of September 10, 1975, to whom the Claimant paid freight charges under the applicable ICC Docket No. 34971 tariffs for shipments between May 21, 1968 and August 29, 1969, inclusive, shall prepare and serve the claim on the attorneys for the plaintiff class *by October*

1, 1976. The form of claim shall be substantially the same as the form attached hereto as Schedule "F" and shall contain substantially the information called for therein. Each claim shall be supported by paid freight bills or other appropriate evidence. Each claim form shall also be accompanied by a verification that the claim is true and correct and that neither the Shipper nor any of its agents or employees have filed claims against any connecting line or other Carrier on the same shipment. On application of the attorneys for the plaintiff class, the Clerk of this Court shall enter judgment in favor of each Claimant against each Defaulted Defendant for 100% of the verified claim plus interest at the rate of 6% per annum from August 29, 1969 and shall enter judgment in favor of the attorneys for the plaintiff class against each Defaulted Defendant for 33⅓% of the total of each judgment entered in favor of each Claimant against each Defaulted Defendant.

ENTER:

_____

JUDGE

c/o CANEL & CANEL
33 North Dearborn Street
Chicago, Illinois 60602
372-7900

[Exhibits to order have been omitted.]